

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs August 26, 2009

**STATE OF TENNESSEE v. KEITH DEWAYNE HUXOLL**

**Appeal from the Criminal Court for Sullivan County**  
**No. S53700 R. Jerry Beck, Judge**

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**No. E2008-02601-CCA-R3-CD - Filed January 25, 2010**

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The Appellant-Defendant, Keith Dewayne Huxoll, appeals his conviction for evading arrest, a Class D felony. He received a twelve-year sentence as a career offender for evading arrest and was ordered to pay a \$3,000 fine. Huxoll claims he is entitled to a new trial because he could have been convicted of the lesser-included offense, the Class E felony of evading arrest, if “the Trial Court had instructed the jury properly prior to its initial deliberation.” Because Huxoll failed to timely file his motion for new trial, and none of the claims presented amount to plain error, these issues have been waived. Accordingly, the judgment of the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J. and D. KELLY THOMAS, JR., JJ., joined.

Randall D. Fleming, Kingsport, Tennessee, for the Appellant-Defendant, Keith Dewayne Huxoll.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Joseph E. Perrin, Assistant District Attorney General, for the Appellee, State of Tennessee.

**OPINION**

**Facts.** Huxoll was charged by presentment with reckless endangerment; evading arrest, the Class D felony offense; violation of registration; driving on a suspended license; and second offense driving on a suspended license.

At trial, Officer Glen Craddock of the Kingsport Police Department testified that on April 7, 2007, he was in his patrol car looking for traffic infractions. At approximately 12:30 p.m., he saw a blue Mercury Lynx with an expired vehicle registration tag. The vehicle was

unoccupied except for the driver. Officer Craddock described the driver as a “[b]ushy-haired white male” who was wearing a blue hat. Officer Craddock began to follow the blue Mercury, and he informed the dispatcher of the numbers from the vehicle registration tag. The blue Mercury approached a stop light, and it pulled into the left-hand turning lane. Officer Craddock was two cars behind the blue Mercury. When the light turned green, Officer Craddock said the blue Mercury did not turn left, but instead “shot directly across the intersection.” Officer Craddock proceeded through the intersection in pursuit. He activated his emergency lights after the blue Mercury turned right onto another street. Upon activating his emergency lights, Officer Craddock said the blue Mercury “actually accelerated. And it was obviously pulling away from me.” Officer Craddock said the blue Mercury ran through a stop sign, before turning right onto a street that led to the original intersection.

Officer Craddock testified that the blue Mercury then approached a stop light where three cars were already stopped. He said the blue Mercury “didn’t even slow down. Goes to the right side of these vehicles; continues through the red light crossing Lynn Garden Drive onto Sullivan Street.” The blue Mercury was traveling “well above” the thirty miles per hour speed limit. Officer Craddock continued to pursue the blue Mercury with his emergency lights activated. He said the blue Mercury ran through two more stop signs before eventually turning onto a two-lane street. On that street, the blue Mercury illegally passed three vehicles, crossing over the double-yellow dividing line. Officer Craddock ended his pursuit after the blue Mercury exceeded eighty miles per hour in a residential area.

Soon thereafter, Officer Craddock was informed over the radio that another officer had spotted the blue Mercury at a residence in the area. He went to the residence where he saw a blue Mercury and Huxoll, a bushy-haired, white male. The vehicle had the same expired tag as the one he had seen earlier. Officer Craddock testified that he had “no doubt” that Huxoll was the individual who fled.

Officer Amanda Lunsford of the Kingsport Police Department testified that she assisted Officer Craddock in the arrest of Huxoll. Based on the information from the dispatch, she searched the general area where the blue Mercury was last seen. Officer Lunsford said she “observed the blue hatchback vehicle . . . parked in a driveway with a gentleman that leaned over into the passenger side as I drove by.” She quickly parked her patrol car behind the vehicle. As Officer Lunsford approached Huxoll’s vehicle, he sat up in his seat. She said he wore a blue hat. She handcuffed Huxoll before Officer Craddock’s arrival.

A jury charge conference was held before the jury was instructed on the charged offenses. For count two of the presentment, the trial court said it would instruct the jury on the charged offense, the Class D felony of evading arrest, as well as the lesser-included

offenses of evading arrest, the Class E felony, and reckless driving. At the conference, the trial court read a Tennessee Pattern Jury Instruction for evading arrest, which stated:

Defendant was operating a motor vehicle on a public road or highway but the officer gave a signal. After the signal was given the Defendant fled. The Defendant acted intentionally. And the Defendant's flight created a risk of death or injury.

The State discussed with the trial court that the lesser-included offense of evading arrest, the Class E felony, was distinguishable from the Class D felony because the Class E felony did not require that the defendant's flight create a risk of death or injury. At the end of the conference, the trial court asked Huxoll on two separate occasions whether he objected to the jury instructions. Huxoll responded both times that he did not.

During the jury charge, the trial court instructed the jury on the five elements of evading arrest, the Class D felony, including the requirement that the "Defendant's flight created a risk of death or injury to innocent bystanders or other third parties." The jury instruction referred to the Class D felony as "Evading arrest while operating a motor vehicle." With regards to the lesser-included offenses, the trial court stated:

If you have a reasonable doubt as to the Defendant's guilt of evading arrest while operating a motor vehicle as charged in Count 2 of the presentment then your verdict must be not guilty as to the offense, and then you shall proceed to determine his guilt or innocence of the lesser included offense of evading arrest.

If you have a reasonable doubt as to the Defendant's guilt of evading arrest then your verdict must [be] not guilty as to this offense, and you shall proceed to determine whether he is guilty or not guilty of the lesser-lesser included offense of reckless driving.

The trial court then went through the elements of evading arrest, the Class E felony, and reckless driving. The jury instruction referred to the Class E felony as "Evading Arrest." After reading the jury instructions and verdict forms, the trial court asked Huxoll if he had any objection or special request. Huxoll said he did not.

The jury found Huxoll guilty of all of the charged offenses.<sup>1</sup> Regarding count two, the jury found Huxoll guilty of “Evading arrest while operating a motor vehicle,” “Evading arrest,” and “Reckless driving.” The trial court determined that count two was an “irregular verdict.” Consequently, for count two, the trial court gave the jury a supplemental instruction which stated that Huxoll could be found guilty of only one of the charged offenses.

After deliberating a second time, the jury returned a verdict form which found Huxoll guilty of “Evading arrest while operating a motor vehicle.” The State quickly informed the trial court that the lesser-included offense of evading arrest, the Class E felony, also required that Huxoll operate a motor vehicle; therefore, it was unclear whether the jury convicted Huxoll of the Class D or Class E felony offense. The jury was then given a second supplemental instruction which clarified that evading arrest, the Class D felony, required finding that Huxoll’s flight created a risk of death or injury. After deliberating a third time, the jury found Huxoll guilty of evading arrest, the Class D felony. The trial court showed Huxoll the verdict form for count two. The trial court asked Huxoll if he was satisfied with the verdict, and he responded that he was satisfied.

The judgments were entered against Huxoll on June 11, 2008. On August 28, 2008, he filed a motion for new trial, alleging, “The jury was not given proper nor sufficient instructions. The jurors had returned an improper verdict and had to deliberate again.” At the motion for new trial hearing on September 11, 2008, the trial court denied Huxoll’s challenge to the jury instructions; however, it permitted the defense to file an amended motion for new trial. An amended motion for new trial was filed on September 23, 2008, alleging that “testimony of the witnesses for the State of Tennessee concerning a video recording was in question.” On November 12, 2008, the amended motion for new trial was denied. The record does not include an order denying the motion for new trial, only the minutes from the hearing on the November 12, 2008, that reflect the motion was denied.

## **ANALYSIS**

Huxoll claims he should receive a new trial because “mistakes in the judgment forms and the numerous instructions to the jury by the Trial court did nothing but confuse the jury.” He acknowledges that he did not object to the jury instructions or verdict forms at trial; however, he claims his substantial rights were affected by the trial court’s errors. In response, the State argues Huxoll’s claim is waived because his motion for new trial was untimely, and Huxoll failed to object at trial. The State also asserts that the alleged errors did not amount to plain error. Upon review, we agree with the State.

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<sup>1</sup>The judgment form for count five of the presentment shows that the jury found Huxoll guilty of second offense driving on a suspended license. The trial transcript, however, indicates that Huxoll pled guilty to that charge while the jury deliberated.

Rule 33(b) of the Tennessee Rules of Criminal Procedure states:

Time for Motion; Amendments. A motion for a new trial shall be in writing or, if made orally in open court, be reduced to writing, within thirty days of the date the order of sentence is entered. . . .

Tenn. R. Crim. P. 33(b) (2007). In State v. Martin, the Tennessee Supreme Court stated:

[Rule 33(b)] is mandatory, and the time for the filing cannot be extended. Tenn. R. Crim. P. 45(b). A trial judge does not have jurisdiction to hear and determine the merits of a motion for a new trial that has not been timely filed. State v. Dodson, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989); State v. Givhan, 616 S.W.2d 612, 613 (Tenn. Crim. App. 1981); Massey v. State, 592 S.W.2d 333, 334-35 (Tenn. Crim. App. 1979). The trial judge's erroneous consideration of ruling on a motion for new trial not timely filed, as in this case, does not validate the motion. Dodson, 780 S.W.2d at 780.

Failure to file a written motion for new trial within the required thirty days not only results in the appellant losing the right to have a hearing on the motion, but it also deprives the appellant of the opportunity to argue on appeal any issues that were or should have been presented in the motion for new trial. Dodson, 780 S.W.2d at 780; Givhan, 616 S.W.2d at 613; Massey, 592 S.W.2d at 333.

940 S.W.2d 567, 569 (Tenn. 1997). Here, Huxoll's motion for new trial was filed more than thirty days after the judgments were entered. Furthermore, because the trial court did not have jurisdiction to deny the motion for new trial, Huxoll's notice of appeal to this court was also untimely. See T.R.A.P. 4(a) (2007) ("[T]he notice of appeal required by Rule 3 shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from."). The timely filing of a notice of appeal is not a prerequisite to the jurisdiction of this court, and this court may waive the requirement in the interest of justice. Id. However, waiver is not automatic and should only occur when "the interest of justice" mandates waiver. State v. Rockwell, 280 S.W.3d 212, 214 (Tenn. Crim. App. 2007). If this court were to summarily grant a waiver whenever confronted with untimely notices, the thirty-day requirement of Tennessee Rule of Appellate Procedure 4(a) would be rendered a legal fiction. Id. In this case, prior to Huxoll's hearing on his motion for new trial, Huxoll requested a transcript of his one-day trial. The trial court explained that Huxoll would not receive the transcript because of the court reporter's schedule, denied the motion for new trial as filed, but allowed Huxoll to file an amended motion for new trial after counsel listened to a CD of the trial. Under these circumstances, we conclude review of the issues presented in this appeal is appropriate in the interest of justice.

As an initial matter, Huxoll's failure to object to the jury instructions at trial did not amount to waiver of that issue. Rule 30(b) of the Tennessee Rules of Criminal Procedure provides that while either party may object to jury instructions after the charge is delivered, such an objection is not necessary to preserve the issue on appeal. See also State v. Bush, 1993 WL 156142 \* 1 (Tenn. Crim. App., at Nashville, May 13, 1993). Here, Huxoll argued the trial court erred in charging the jury in his motion for new trial. The trial court denied the motion for new trial without elaboration. Nevertheless, as previously stated, Huxoll's untimely filing of the motion for new trial rendered it and any ruling on it a nullity or invalid. See State v. Martin, 940 S.W. 2d 567, 569 (Tenn. 1997). Accordingly, our review is limited to plain error. T.R.A.P. 36(b) (2007) ("When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal.").

In State v. Adkisson, this court stated that in order for an error to be considered plain:

- (a) the record must clearly establish what occurred in the trial court;
- (b) a clear and unequivocal rule of law must have been breached;
- (c) a substantial right of the accused must have been adversely affected;
- (d) the accused did not waive the issue for tactical reasons; and
- (e) consideration of the error is "necessary to do substantial justice."

899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (citations omitted). All five factors must be shown, and it is not necessary to consider every factor if it is obvious that one of the factors cannot be established. State v. Smith, 24 S.W.3d 274, 282-83 (Tenn. 2000).

Consideration of this issue is not necessary to do substantial justice because a substantial right of the accused was not adversely affected. Before the initial deliberation, the trial court properly instructed the jury of the five elements of evading arrest, the Class D felony, and the four elements of evading arrest, the Class E felony. The jury was informed that if it did not find Huxoll guilty of the charged offense, it could consider the lesser-included offenses. We recognize that the trial court should not have referred to evading arrest, the Class D felony, as "evading arrest while operating a motor vehicle" in the jury instruction, because evading arrest, the Class E felony, also requires that the defendant operated a motor vehicle. Nonetheless, any confusion as to the difference between the two offenses was clarified by Supplemental Jury Charge #2. We cannot conclude that Huxoll's defense was prejudiced from the delay caused by the second supplemental charge. Furthermore, consideration of this issue is not necessary to do substantial justice. Upon review of the record, the alleged errors did not amount to plain error, and therefore Huxoll is not entitled to relief.

## CONCLUSION

Upon review, we affirm the judgment of the trial court.

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CAMILLE R. McMULLEN, JUDGE